UNITED STATES OF AMERICA	)	
	)	
v.	)	PROSECUTION RESPONSE TO
	)	DEFENSE MOTION TO ABATE
SALIM AHMED HAMDAN	)	
	)	15 October 2004

1. Timeliness. This motion is submitted within the time frame established by the Presiding Officer's Order during the Military Commission hearing on 24 August 2004.

2. Relief Sought. That the Defense motion to abate these Military Commission proceedings be denied and that the trial continue as scheduled.

3. Overview. The Defense filed a writ in federal court in the State of Washington on April 6, 2004. After filing in the wrong venue and in the name of an improper party, the writ is now being litigated in the District Court of the District of Columbia. To date, no federal court has issued any injunctions enjoining Military Commissions from proceeding.

Under the well recognized concepts of exhaustion and abstention, this Commission should continue with this trial, build a record, and grant the Defense any of the requested relief that they are entitled to under the law.

4. Facts. The Prosecution agrees with Defense facts (a), (c) and (d).

5. Legal Authority

a. Authorization for Use of Military Force, Pub. L. 107-40, 115 Stat. 224 (2001)

b. Articles 21 and 36 of the Uniform Code of Military Justice

c. Ex parte Quirin, 317 U.S. 1 (1942)

d. Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57833 (Nov. 13, 2001)

e. In reYamashita, 327 U.S. 11 (1946)

f. Johnson v. Eisentrager, 339 U.S. 763 (1950

g. American College of Trial Lawyers, Report on Military Commissions For the Trial of Terrorists (March 2003)

h. Schlesinger v. Councilman, 420 U.S. 738 (1975)

i. New v. Cohen, 129 F.3d 639 (U.S. App. 1997)

j. Picard v. Connor, 404 U.S. 270 (1971)

k. Military Commission Order No. 1

l. FM 27-10 The Law of Land Warfare (1956)

m. United States v. Verdugo Urquidez, 494 U.S. 259 (1990)

n. Colepaugh v. Looney, 235 F.2d 420 (10th Cir. 1956)

o. Reid v. Covert, 354 U.S. 1 (1957)

p. United States v. ex rel. Toth v. Quarles, 350 U.S. 11 (1955)

q. Francis A. Gilligan and Frederic L. Lederer, Court-Martial Procedure section 1-52.00 (The Michie Co. 1981)

r. Noyd v. Bond, 395 U.S. 683 (1969)

s. Hamdi v. Rumsfeld, 124 S. Ct. 2633 (2004)

t. Murray v. Haldeman, 16 M.J. 74 (C.M.A. 1983)

u. Hammond v. Lenfest, 398 F.2d 705 (2nd Cir. 1968)

v. McNeese v. Board of Ed. For Community School Dist. 187, 373 U.S. 668 (1963)

w. McCarthy v. Madigan, 503 U.S. 140 (1992)

x. United States v. MacDonald, 435 U.S. 850 (1978)

y. Andrews v. Heupel, 29 M.J. 743 (A.F.C.M.R. 1989)

z. Pascascio v. Fischer, 34 M.J. 996 (A.C.M.R. 1992)

6. Legal Analysis.

On September 11, 2001, the al Qaida terrorist network launched a coordinated attack on the United States, killing approximately 3000 persons. Congress responded by passing a resolution authorizing the President:

> to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored

such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

Authorization for Use of Military Force, Pub. L. 107-40 section 1-2, 115 Stat. 224 (2001) ("AUMF").

Consistent with historical practice, on 13 November 2001, the President issued a Military Order establishing military commissions to try detainees such as the Accused for violations of the laws of war and other applicable laws. In doing so, the President expressly relied on "the authority vested in me . . . as Commander in Chief of the Armed Forces of the United States by the Constitution and the laws of the United States of America, including the [AUMF] and sections 821 and 836 of title 10, United States Code."[1] Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57833 (Nov. 13, 2001) (hereinafter "Military Order").

Article 21 of the UCMJ specifically provides for the trial of "offenders or offenses that by statute or by the law of war may be tried by military commissions." The procedures to be utilized during these commission proceedings rest within the sole control of the President. UCMJ Article 36. Exercising this authority, the President made a determination that it was not practicable to utilize rules and procedures generally recognized in United States federal district courts and he provided that the Secretary of Defense would issue the implementing rules of procedure to be used at military commissions. Acting upon this delegation, the Department of Defense has issued several implementing Orders, Instructions and Regulations.

a. Use of Military Commissions is Firmly Established and Federal Courts Have Not Enjoined Their Use.

As a plurality of the Supreme Court just months ago held, "The capture and detention of lawful combatants and the capture, detention, *and trial* of unlawful combatants, by 'universal agreement and practice,' are 'important incident[s] of war.'" and such actions fall within the congressional authorization delineated in the AUMF. Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2639 (2004) (plurality opinion), citing Ex parte Quirin, 317 U.S., at 28 (emphasis added). While two habeas petitions have made their way to the United States Supreme Court and several other habeas petitions are pending in lower federal courts, no federal court has indicated any concern with the commission process or ordered any abatement of commission proceedings. See e.g., Hamdi, 124 S. Ct. 2633; Rasul v. Bush, 124 S. Ct. 2686 (2004).

Since the founding of this nation, the military has used military Commissions to try violations against the laws of war. The Supreme Court upheld the use of

[1] Sections 821 and 836 are, respectively , Article 21 and 36 of the Uniform Code of Military Justice (UCMJ).

military commissions during World War II against a series of challenges, including cases. Ex parte Quirin, 317 U.S. 1 (1942); In re Yamashita, 327 U.S. 11 (1946); Johnson v. Eisentrager, 339 U.S. 763 (1950). Despite the fact that both Congress and the Judiciary have blessed the Executive's use of military commissions, despite the fact that the statutory framework today is identical in all material respects to that which existed during the prior legal challenges, and despite the fact that the President has inherent power as Commander in Chief to establish military commissions, the Accused contends that this Commission should be held in abeyance while a federal district court decides issues of jurisdictions, constitutionality, compliance with international law, and speedy trial. See American College of Trial Lawyers, Report on Military Commissions For the Trial of Terrorists (March 2003) (Article 21 of the UCMJ and the Congressional Joint Resolution provide ample authority for the President to establish military commissions for the trials of those accused of violating the law of war).

b. Exhaustion and Abstention.

Federal courts, absent an extraordinary circumstance, require an Accused challenging the military judicial process to exhaust all of his remedies within the Military system before addressing a collateral attack. See Schlesinger v. Councilman, 420 U.S. 738 (1975) (rejecting Army Captain's attempt to enjoin his impending court-martial on drug charges); New v. Cohen, 129 F.3d 639 (U.S. App. D.C. 1997) (applying principles of comity in requiring servicemember to exhaust military remedies before seeking collateral review in federal court). The seminal case in addressing challenges to the military judicial process is Schlesinger v. Councilman, 420 U.S. 738 (1975). This Court recognized that "military law . . . is a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment." Id. at 746 (quoting Burns v. Wilson, 346 U.S. 137, 140 (1953)). In determining the proper role for federal courts presented with challenges to military proceedings, the Court found instructive the federal approach to ongoing state court proceedings. See Picard v. Connor, 404 U.S. 270 (1971) (state prisoner must normally exhaust available state remedies before federal court will entertain habeas petition); 28 U.S.C section 2254 (codifying that a person in State custody will not have habeas application heard unless they demonstrate exhaustion of all remedies available in the courts of the State). The Councilman Court observed that "consideration of comity [and] the necessity of respect for coordinate judicial systems have led this Court to preclude equitable intervention into pending state criminal proceedings unless the harm sought to be averted is both great and immediate, of a kind that cannot be eliminated by . . . defense against a single prosecution." 420 U.S. at 756 (internal quotation marks omitted).

With respect to intervention in pending military proceedings, the Court went further explaining that "there is here something more that, in our view, counsels strongly against the exercise of equity power even where, under the administrative exhaustion rule, intervention might be appropriate." Id. at 757. The Court identified that "something" as "the unique military exigencies" that set the military

apart from civilian society and that relate to its "primary business - - - to fight or be ready to fight wars should the occasion arise. Id. Based on these "strong considerations" the Court held that "when a serviceman charged with crimes by military authorities can show no harm other than the attendant resolution of his case in the military court system, the federal district courts must refrain from intervention, by way of injunction or otherwise." Id. at 758, 761.

The Court rejected Councilman's contention that the threat of being deprived of his liberty by a court lacking jurisdiction constituted "irreparable harm" justifying federal court intervention. The Court explained that '"(c)ertain types of injury, in particular, the cost, anxiety, and inconvenience of having to defend against a single criminal prosecution, (can) not by themselves be considered "irreparable" in the special legal sense of that term."' Id. at 755 (quoting Younger v. Harris, 401 U.S. 37, 46 (1971) (parentheses in Councilman).

The principles that spurred the Councilman Court to bar federal court intervention in ongoing military proceedings apply with even great force here, where the President in his capacity as Commander in Chief, and with the approval of Congress, establishes the military commissions challenged herein upon finding that they are "necessary" for "the effective conduct of military operations and prevention of terrorist attacks." Military Order section 1(e). Given that the military commissions are designed to mete out justice to unlawful enemy combatants who are captured during the ongoing war with al Qaida and its supporters, the traditional deference courts pay the military justice system is at the pinnacle. The Executive Branch bears the responsibility for protecting the nation from foreign attack and is in the best position to determine the process to which those enemy combatants charged with violations of the laws of war will be subject, consistent with national security and the need to provide a full and fair trial. Id. at sections 1(f) and 4(c)(2). The Executive Branch has exercised that authority in this war by establishing military commissions and the procedures governing their use, including multiple levels of review. See Military Commission Order No. 1. It is inappropriate for a federal court to intervene until the Commission process has been given the opportunity to justly and fairly decide this case.

c. The Military is Best Suited to Initially Respond to The Issues Raised.

The Defense relies upon the Quirin case to assert it would be futile to bring these current motions and claims before this Military Commission. Defense Motion at para 5(b). Although not referenced anywhere in the Supreme Court's decision in Quirin, the Defense's support for this assertion is a quote from Attorney General Francis Biddle who was then serving as the Prosecutor in the commission trial. Id. The Defense neglects to highlight that despite this bald assertion by Biddle on July 8, 1942, the Commission proceeded through the presentation of all evidence on the merits of the case. Quirin, Trial transcript. In moving forward, the Commission in Quirin ruled on many motions and objections prior to any arguments before the Supreme Court. It was not until July 29, 1942 that the Supreme Court convened to

address issues pursuant to a writ of habeas corpus. Quirin, 317 U.S. at 7. The Supreme Court decided to hear oral argument on the issues raised because the "public interest" in deciding these questions required these issues to be decided. Id. at 6. There was no mention by the Supreme Court that presenting these issues to Commission members would be futile or that they would somehow not fairly evaluate the issues. Id. The Defense points to no authority permitting relief from the exhaustion requirement based upon their own self-serving prediction that their claims will prove unsuccessful in the forum to which they must initially be brought. Based upon the extensive voir dire in this Commission case as well as the extraordinary accomplishments and records of the members of the Commission panel, the Prosecution is quite confident that Defense motions will be fairly resolved.

The Accused initially filed in federal court on April 6, 2004. To date, no federal court has issued any injunctions requiring this Commission to be held in abeyance. As this Commission is aware, we have already conducted courtroom hearings in this case in August of 2004 and there was no intervention by any federal court. It is a matter of public record that this Commission will reconvene in November to litigate motions. Despite the Defense asking the federal court to hold this Commission in abeyance, no such requested order has been issued by the federal court. The Defense is asking this Commission to do something which at least by implication, the federal district court has not yet deemed necessary.

Many of the issues raised by the Defense are issues that are within the area of expertise of the military. For the most part, this Commission trial is about law of war violations. Who better to determine these issues than personnel assigned to the executive department tasked with going to war and tasked with training its own personnel on the law of war? This is our business. Probably the most authoritative document addressing the law of war within any department of the United States is FM 27-10 The Law of Land Warfare (1956). This manual, created by the Department of the Army is one of the most comprehensive guides on the law of war and is routinely recognized as an authoritative source.

Relying on Supreme Court precedent, the Defense Motion at paragraph (5)(c)(6) states that military courts lack the expertise to consider constitutional issues. To begin with, the Accused does not have constitutional rights so the disposition of this issue should not be that burdensome. See United States v. Verdugo Urquidez, 494 U.S. 259 (1990) (alien with no voluntary connection to the United States has no constitutional rights). Furthermore, it has clearly been recognized that a Military Commission is a lawful tribunal to adjudge enemy offenses against the laws of war. Johnson v. Eisentrager, 339 U.S. 763, 786 (1950); Colepaugh v. Looney, 235 F.2d 429 (10th Cir. 1956) (law of war violations are offenses clearly within the jurisdiction of a military commission with power to try, decide and condemn).

Realizing that the case law is not supportive of their position, the Defense attempts to rely on several Supreme Court decisions that have little applicability to

the issues at hand. See Defense Motion at fn.5. Reid v. Covert, 354 U.S. 1 (1957) and United States ex rel. Toth v. Quarles, 350 U.S. 11 (1955) related to military trials of civilians who were United States citizens. The Supreme Court felt a need to intervene in these cases because of the potential "disruption caused to petitioner's civilian lives." Such a consideration has no applicability with respect to the case at hand. While the Defense attempts to portray the Accused as a "civilian", he is in fact an unlawful enemy combatant (as confirmed by the Combatant Status Review Tribunal on 3 October 2004). It is for this reason that the Defense request for a speedy trial prior to charges being referred was denied. See General Hemingway's memo of February 23, 2004 (advising defense counsel that Mr. Hamdan was currently being detained because of his status as an unlawful enemy combatant).

To date, this Military Commission has not caused any disruption of the Accused's civilian life as his basis for detention is his status as an unlawful enemy combatant. Many lives are disrupted during wartime. As the acknowledged longstanding driver of Usama bin Laden, the man responsible for the murder of approximately 3000 Americans and for telling Muslims it is their duty to kill Americans wherever they may be found, the Accused should reasonably expect some disruption in his life. Additionally, Reid and Toth were cases related to charges totally unrelated to warfare. Hamdan's military prosecution presents military exigencies related to the conduct of war and the national security of the United States that were simply non-existent in Reid and Toth.

In New v. Cohen, the D.C. Circuit made clear that a case such as Hamdan's is governed by Councilman and that the extraordinary exceptions cited above do not apply. 129 F.3d 639 (D.C. Cir. 1997). In New, a medic serving in the armed forces was charged to appear before a court-martial for failing to obey a direct order. Id. at 640. He filed a habeas petition arguing that the military had no jurisdiction over him because he was a civilian. Id. at 645-46. Declining to follow the exceptions in Reid and Toth, the court distinguished those cases by observing that "[i]n the cases embracing this exception [to Councilman], it has been *undisputed* that the persons subject to the court-martials (sic) either never had been, or no longer were, in the military." Id. at 644 (emphasis added). Because the medic's civilian status was disputed—and because Councilman made clear that military courts are capable of, and indeed may have superior expertise in, considering challenges to their jurisdiction, the court required him to "argue [jurisdiction] to the military authorities reviewing his case." Id at 645. And so should Hamdan be required to present his jurisdictional challenge to the military commission: his civilian status is *disputed*.

It is also noteworthy that the petitioners challenging military jurisdiction in Councilman and New were United States citizens, unlike this Accused, an alien with no voluntary ties to the United States charged with violating the laws of war. The Supreme Court has emphatically held "that the Constitution does not confer a right of personal security or immunity from military trial and punishment upon an alien enemy engaged in the hostile service of government at war with the United

States." Johnson v. Eisentrager, 339 U.S. 763, 785 (1950). Certainly, then, interrupting military proceedings is no more justifiable here than in Councilman and New, where *citizen*-servicemen had no access to federal courts pending their courts-martial.

The Defense also relies on the case of "Noyd, 395 U.S. at 89 n.8" Defense Motion at 5(C)(6). The Prosecution assumes this cite is in error and in fact refers to the case of Noyd v. Bond, 395 U.S. 683 (1969). Regardless, the Supreme Court relying on civilian deference to military tribunals ruled in favor of the United States and denied relief because the petitioner had not exhausted his remedies within the military system. Id at 694.

d. This Issue is Not Extraordinary.

Although Military Commissions have not been used for many years, the authority for and legality of Commissions is firmly established. Ex parte Quirin, 317 U.S. 1 (1942); In re Yamishita, 327 U.S. 1 (1946); Eisentrager. 339 U.S. 763 (1950); Colepaugh, 235 F.2d 429. With the President's power to utilize Commissions for the trial of law of war and other offenses so firmly established, there is nothing in the claims of the Accused that merits holding these proceedings in abeyance. Specifically with respect to this current conflict, the Supreme Court recently held in Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2640 (2004) (plurality opinion) that the Congressional Authorization to Use Military Force triggered the exercise of the President's traditional war powers, which undoubtedly include the power to convene military commissions. See AUMF, Pub. L. No. 107-40.

The Defense reliance on Murray v. Haldeman, 16 M.J. 74 (C.M.A. 1983) and Hammond v. Lenfest 398 F.2d 705 (2nd Cir. 1968) for the proposition that federal courts should decide these issues first is misplaced. In Murray, a case that only involved military courts, the court stated that intervention even by a superior military court was "a drastic remedy . . .[that] should be invoked only in truly extraordinary situations." 16 M.J at 76 quoting United States v. Labella, 15 M.J. 228 (C.M.A. 1983). No such extraordinary situation exists in this case as the legality of military commissions is firmly established. In Hammond, the federal court intervened because the accused's request to obtain conscientious objector status had already been rejected by the highest authority of the Selective Service. 398 F.2d at 713-15. Regardless of the findings of the court-martial, this status was not going to change. Id. Therefore, factually, Hammond had exhausted all of his remedies with respect to the relief sought. Id. This is different from this Commission case where the Commission is still capable of providing the requested relief if warranted under the law.

The Defense reliance on McNeese v. Board of Ed. For Community School Dist. 187 is also misplaced as conceded by the Defense in the parenthetical to their motion. Defense Motion at 5(c)(4). As the Defense conceded, this ruling in favor of federal review was based upon the school superintendent having no ability to

provide the requested relief. For all practical purposes, the available remedies under Illinois law had been exhausted. This differs greatly from the case at hand where the Commission has not even had the opportunity yet to rule on these motions and provide appropriate relief if warranted.

e. There are in Fact Advantages to Proceeding and Creating a Record.

An examination of the Defense motions filed in this case demonstrates why proceeding first with a Commission trial will be prudent. Resolution of many of these issues is extremely fact sensitive and requires a full presentation by both parties to fairly resolve the issues. McCarthy v. Madigan, 503 U.S. 140, 143-44 (1992) (exhaustion of existing agency procedure may produce a useful record for subsequent judicial consideration especially in a complex or technical factual context).

For example, two of the Defense motions relate to allegations that the Accused has been denied speedy trial rights (Motion to Dismiss under Article 103 of Geneva and Motion to Dismiss Under Article 10 of the UCMJ). Although highly unlikely, if the Defense can meet the threshold requirement that these provisions have application to the Accused, it will be of extreme importance to develop a factual record to assess if the Accused's speedy trial rights have been violated. See United States v. MacDonald, 435 U.S. 850, 858-59 (1978) (speedy trial claim collateral review should be conducted post-trial when factual basis in support of claims has been established rather than relying on speculation as to whether the accused has been prejudiced). Even in a case cited by the defense that involved a challenge on speedy trial grounds, there was no intervention with respect to responding to a writ until after the trial judge had already made findings of fact and conclusions of law with respect to the speedy trial motion filed. Andrews v. Heupel, 29 M.J. 743 (A.F.C.M.R. 1989). In a later similar speedy trial case, the Army Court of Criminal Review distinguished the Heupel case and found it to be unique because the trial judge's decision was so clearly erroneous that it constituted a "usurpation of power." Pascascio v. Fischer, 34 M.J. 996, 999-1000 (A.C.M.R. 1992) (finding that speedy trial claims are not sufficiently independent of the outcome of the trial to warrant pretrial appellate review).

Another motion brought on behalf of the Accused is based on whether he can be convicted as a conspirator under international law. (Defense Motion to Dismiss for Failure to State an Offense). The Defense contends among other things that the Accused is not subject to being tried as a conspirator because he is a "minor actor." Assuming this is even a valid legal theory, it is a matter that most likely cannot be resolved pretrial, but rather requires a full trial on the merits where this can be factually developed.

We have already had an example where not developing a full record can lead to misleading statements and assertions. The Defense in their motion states that "there has already been a finding by a federal judge that the excessive delay in this case

has injured Mr. Hamdan psychologically." Defense Motion at para 5(c) (7). What the judge actually stated was that the court "recognizes that, *based on the evidence currently before the court*, Hamdan is at risk of harm from continued detention at Camp Echo." The only evidence before the federal court at the time was an affidavit from a Psychiatric professional opining on Hamdan's condition despite not having met the Accused or having observed his conditions of detention. In fact, the Prosecution will have a substantial amount of factual information to present on this issue should it be raised before this Commission.

With respect to the jurisdiction issues raised by the Defense, they are not novel as they may have been in 1942 when the Supreme Court interceded in Quirin. It is now firmly established that "without doubt" the President, as Commander in Chief of the armed forces, has the authority to invoke the law of war by appropriate proclamation; define the various offenses against the law of war; and to establish military commissions with jurisdiction to try all persons charged with defined violations. Colepaugh, 235 F.2d at 432; American College of Trial Lawyers, Report on Military Commissions For the Trial of Terrorists (March 2003) (Article 21 of the UCMJ and the Congressional Joint Resolution provide ample authority for the President to establish military commissions for the trials of those accused of violating the law of war).

f. This Case is Moving Forward with Due Diligence and at a Reasonable Pace.

The Accused is an unlawful enemy combatant. This is clearly demonstrated by the documents referencing the Accused's own statements as delineated in the Prosecution fact section response to the Defense motion challenging the conspiracy charge. Since referral of charges in July, this Commission has moved at a remarkable pace considering logistics and the burdens inherent in commencing trials within a system not utilized in approximately 60 years.

Contrary to what the Defense alleges, there is not an indefinite timeframe for administrative action or for this Commission trial to be conducted. There has already been a formal administrative determination by the Combatant Status Review Tribunal that the Accused meets the criteria for classification as an enemy combatant. Furthermore this Commission has scheduled motions for resolution in November and a trial on the merits to commence in December.

The Defense assertion that things would be different if this was "a military court following American military law" is confusing if not completely irrelevant. This is a military court that is created in accordance with Article 21 of the UCMJ by the President exercising his Constitutional powers. American military law includes cases such as Quirin, Eisentrager and Colepaugh. This is a Military Commission designed to provide a full and fair trial. It is not, nor is it required to be, as the Defense would like, a court-martial.

7. Attached File.

a. General Hemingway Memo of February 23, 2004

b. Combatant Status Review Tribunal Decision Report Cover Sheet

8. Oral Argument. The Prosecution is prepared to provide oral argument if deemed necessary.

XXXX
Commander, JAGC, USN
Prosecutor
Office of Military Commissions